Hospital San Pablo, Inc. *and* Federacion de Trabajadores de la Empresa Privada (FETEMP). Case 24–CA–7611

December 15, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 20, 1998, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Abidal Arroyo for engaging in union activity. In its exceptions, the Respondent contends the judge erred in inferring that the Respondent knew of Arroyo's activity. We find no merit to this contention.

As noted by the judge, the record shows that Arroyo engaged in extensive and prolonged union activities, that the Respondent knew its employees were engaging in activity in support of the Union, that the Respondent knew the activity began in Arroyo's department, and that the Respondent admitted to employees that it kept a list of those employees involved in the organizing effort. In addition, the Respondent admittedly did not want its employees to be represented by the Union, as evidenced by its threats of job loss and loss of benefits if the employees selected the Union.

Further, as found by the judge, the Respondent engaged in disparate treatment of Arroyo by discharging him for an act of insubordination even though other employees had not been discharged in the past for engaging in similar acts. Significantly, the Respondent did not issue any discipline to the other employee who, together with Arroyo, left work early (the alleged insubordinate act). Finally, the judge found that the Respondent's contention that it took into account Arroyo's entire work record in deciding to discharge him was contrary to the Respondent's assertion to Arroyo that, despite his good evaluation, one act of insubordination was sufficient to discharge him.

We agree with the judge that the above facts clearly establish a prima facie case, under *Wright Line*,[2] that Arroyo's union activity was a motivating factor in the decision to discharge him. We find, in agreement with the judge and contrary to our dissenting colleague, that the absence of direct evidence of the Respondent's knowledge of Arroyo's union activities is not fatal to the General Counsel's prima facie case. Indeed, it is well settled that knowledge of the employee's protected activity need not be established directly, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn.[3] In our view, the instant circumstances create a strong inference that the Respondent knew of Arroyo's union activity.[4] We also agree with the judge that, insofar as the Respondent's reasons for firing Arroyo are unsupportable under the standards it normally applies to employees, the Respondent has not shown that it would have discharged him even absent his union activity. Accordingly, we adopt the judge's finding that Arroyo's discharge was violative of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hospital San Pablo, Inc., Bayamon, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, dissenting in part.

The General Counsel has not established that the Respondent discharged Arroyo for his union activity. More particularly, the General Counsel has not established a critical element of his case, i.e., that the Respondent knew of Arroyo's union activity.

The judge sought to infer such knowledge. He relied on the evidence that: (1) the Respondent had some knowledge of union activity among the employees in general; (2) the first RC petition was limited to the employees working in the department in which Arroyo worked; and (3) a member of the Respondent's management told an employee that, during previous organizing campaigns, the Respondent had learned which employees were for the Union.

As to the first factor, it is neither logical nor reasonable to leap from general knowledge of union activity to specific knowledge of Arroyo's union activity. The instant 8(a)(3) allegation concerns Arroyo, and it would seem that the proof should relate to him.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] See, e.g., *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995).

[4] We find unpersuasive our colleague's suggestion that the Respondent would not consider Arroyo to be a leader in the organizing effort because Arroyo was on vacation from November 5, 1996, until January 9, 1997. In our view, Arroyo's absence does not suggest a lack of involvement. In fact, the record shows that Arroyo was very involved in the campaign during this period by talking to employees away from the Respondent's facility.

As to the second element, there were approximately 99 employees in Arroyo's department. Assuming arguendo that the Respondent would infer that the union campaign was particularly active in this department, one cannot reasonably jump to the conclusion that the Respondent knew *who* in that department was particularly active. In fact, leading union activist Cruz was in that department and was not discharged. Either the Respondent did not know of Cruz' union activity or the Respondent tolerated it. In either event, the General Counsel's case has not been made.

As to the third factor, even if the Respondent told an employee that it knew which employees were active in a previous campaign, that would not establish knowledge of Arroyo's activity in the instant campaign.

Further, Arroyo was on vacation from November 5, 1996, until January 9, 1997. Petitions were filed on November 7 and December 17, 1996.[1] It is counter-intuitive to conclude that the Respondent's knowledge would focus on the absent Arroyo as the organizing force behind these petitions. The third petition was filed on January 16, 1997, the day of Arroyo's discharge. However, it is undisputed that the Respondent had no knowledge of it when the Respondent discharged Arroyo.

With further respect to knowledge, my colleagues note that the Respondent kept a list of employees involved in the Union's organizing effort. However, this asserted fact does not establish that the Respondent knew of Arroyo's union activity. Obviously, the Respondent's list would include only those known by the Respondent to be active in union organizing. The problem for my colleagues is that the evidence does not show the Respondent's knowledge of Arroyo's union activity.

Finally, quite apart from the absence of knowledge, the factor of timing does not support the General Counsel's case. To the contrary, this factor supports the Respondent. On January 13, Arroyo left work earlier than the time ordered by his supervisor. He was discharged for this insubordination 4 days later.

Ismael Rodriguez-Izquierdo, Esq., for the General Counsel.
Tristan Reyes-Gilestra, Esq., of Hato Rey, Puerto Rico, for the Respondent.
Victor Villalba and *Angel Piniero*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on September 2–4 and November 19, 1997.[1] The charge was filed February 21, and the complaint was issued April 29. The complaint as amended alleges that Hospital San Pablo, Inc. (Respondent) discharged its employee, Adibal Arroyo, in violation of Section 8(a)(3) and (1) of the Act. The complaint also alleges that Respondent violated Section 8(a)(1) of the Act by threatening its employees with loss of benefits and loss of employment if they selected Federacion de Trabajadores de la Empresa Privada (FETEMP) (Union) as their bargaining representative, and creating the impression that employees' union activities were under surveillance. Respondent filed a timely answer which admitted the allegations of the complaint concerning the filing and service of the charge, jurisdiction, labor organization status, and agency and supervisory status; it denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the administration and operation of a hospital at its facility in Bayamon, Puerto Rico, where it annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 from points outside the Commonwealth of Puerto Rico. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Arroyo's Work History

Arroyo began his employment with Respondent on November 20, 1991; he worked as a technician in the environmental services (housekeeping) department. On September 14, 1993, Arroyo and another employee were verbally admonished for failing to keep an area of the facility clean. On August 21, 1995, Arroyo was admonished for failing to put away the cleaning materials after he had finished washing and waxing the floor. He was also advised that he must follow instructions because he did not respond to his supervisor's direction to move trash cans. Arroyo explained at the time that he had left the materials at a stairway to block anyone from walking on the floor since it had not yet dried and was slippery. On November 10, 1995, he was verbally advised that he should take his meal period at the established time. On December 26, 1995, he was verbally warned for abusing his sick leave and for failing to return calls made to him by Respondent's supervisors. On December 28, 1995, Arroyo was verbally admonished by his supervisor for taking too much time for break and taking his break at the wrong time. The supervisor's report of this incident indicates that Arroyo responded to this admonishment by stating "[i]n a negative attitude" that the supervisor should tell the rest of the employees the same thing. In September 1996, Arroyo spoke to an employee about how the size of the cleaning staff had apparently diminished and how the cleaning of the facility could as a consequence suffer. Arroyo was later advised that it was inappropriate to make such negative comments about the hospital.

B. Union Activities

After getting the telephone number from a coworker, Arroyo contacted the Union in October 1996. Shortly thereafter, Arroyo met with Victor Villalba, union president, who explained the organizing process to Arroyo; also present was fellow em-

[1] They were subsequently withdrawn.
[1] All dates are in 1997 unless otherwise indicated.

ployee Roberto Cruz. About a week of so later another meeting was held. This time about 15 to 20 of Respondent's employees attended. These employees were also told how the organizing process worked, and the employees, including Arroyo, signed authorization cards on behalf of the Union. Arroyo and Cruz were selected to collect authorization cards from the employees at Respondent's facility. Arroyo solicited signatures from employees at Respondent's facility and at the homes of the employees. About 45 signed cards were collected by Arroyo and Cruz and returned to the Union, which then filed a petition for an election with the Board on November 7, 1996. That petition, limited to a unit of housekeeping employees, was thereafter withdrawn by the Union. Villalba then met again with Arroyo and Cruz before November 15, 1996; this time a third employee was also present. Villalba explained the need to collect more signed authorization cards in a larger unit. Also in November 1996, Respondent held a meeting with its supervisors to advise them of the union campaign; by that time all of the supervisors became aware of the organizing effort.

Arroyo was on vacation from November 15, 1996, until January 9. During that time he continued assisting the organizing effort by talking to employees away from Respondent's facility. Arroyo and Cruz obtained about 40 additional signed cards from Respondent's employees and returned them to the Union. On December 17, 1996, the Union filed another petition with the Board, this time for a unit of Respondent's nonprofessional employees. However, this petition too was withdrawn by the Union due to an inadequate showing of interest from among the petitioned for employees. In January, Villalba again met with Arroyo and Cruz and explained the situation to them. They agreed to continue to solicit signatures for the Union. After they obtained about 45 more signed authorization cards,[2] the Union filed its third petition on January 16.[3] During this period of time Arroyo also spoke to employees on almost a daily basis, both inside and away from Respondent's facility, about the Union.

The parties stipulated to an election, which was conducted on February 28. The results were 95 votes cast for the Union, 133 votes against the Union, and 22 challenged ballots. The Union did not file objections to the election.

C. The Discharge

Employees generally work 8-hour shifts; they normally take one-half hour for a meal period, but Respondent pays them for 8 hours' work. The practice developed that employees might be asked to work through their lunch period and would be permitted to leave 1 hour prior to their scheduled departure time but they would still receive pay for the entire 8 hours. The parties stipulated that under Puerto Rico law, employees are required to be paid double time if they work during their scheduled meal period. As recently as January 11, Arroyo had worked through his lunch period and was permitted to leave 1 hour early.[4]

On Monday, January 13, Arroyo reported to work at 6 a.m.; he was scheduled to work until 2 p.m. That day was a legal holiday in Puerto Rico and much of the office staff was not working. Arroyo was assigned by his supervisor, Victor Baez, to continue a job that he and employee Jorge Hernandez had started 2 days earlier that involved cleaning and waxing an area in the basement in the medical records office area. This was a special task that was performed when the office employees were not working and had to be completed before the office workers returned to work. Arroyo asked Baez whether he wanted them to work straight through without taking their meal period; they would then leave early. Baez said that he would visit the worksite later and discuss the matter with them. Later that morning Baez came to the work area and told Arroyo and Hernandez that they should continue working through their lunchtime and they could then leave at 1 p.m. Arroyo then made plans to take his wife to visit her mother after 1 p.m., and he and Hernandez worked through their meal period. At some point during the morning that day Jose Marzon, finance director, came through the area to do some work in his office which was located in the area that the employees were cleaning.

At or about 12:50 p.m. Hernandez called Baez and asked him to come to the work area. The employees had not yet completed the cleaning and waxing of the entire area. Baez appeared a few minutes later and said that the work was satisfactory but that Arroyo and Hernandez had not completed the project. Arroyo answered that they did not have enough time to complete the job. Now, however, Baez said that the employees could not leave until 1:30 p.m. Arroyo asked why, since earlier that day Baez had said that they could leave at 1 p.m. Baez replied that weeks ago there had been a meeting of supervisors where that policy had been changed.[5] Arroyo questioned how that was possible since he had only recently worked through his lunch period and was permitted to leave at 1 p.m. Hernandez also said that he had recently been permitted to leave at 1 p.m. after working his meal period. Arroyo said he had an appointment at 1 p.m., but Baez said that Arroyo and Hernandez could not leave at 1 p.m.; that they were to stay and complete the job by 1:30 p.m. Arroyo said that they could not complete the job by then and that he disagreed with Baez that they had to stay until 1:30 p.m. Arroyo said that Baez could tell Maria Eugenia del Rio, housekeeping department director, that he left at 1 p.m. despite Baez' orders, and they could discuss the matter on Thursday since Arroyo was off Tuesday and Wednesday. Arroyo and Hernandez left the work area, but as they approached the parking lot area Hernandez said he was going back into the

[2] The facts concerning Arroyo's union activities are based on the uncontradicted testimony of Arroyo and Villalba.

[3] The petition is dated January 16 yet it bears a time stamp by the Region of January 18, leading to the possibility that the Region did not date the petition, or did not do so correctly. However, the precise date that the Region received the petition is not essential in this case because the parties stipulated that Respondent did not have knowledge of the filing prior to Arroyo's termination.

[4] There was testimony that this practice was contrary to Respondent's policy. What Respondent's policy was in this regards is not clear from the record. Director of Environmental Services Director del Rio testified that she instructed supervisors in December 1996, that they were not to permit employees to work through their meal periods and then leave early. Later, after I asked for clarification of the policy, she testified that employees who worked through the meal period were permitted to leave early, but only one half hour early. In any event, del Rio admitted that it was not until February that Respondent had a meeting with the employees where the new policy had been "made official."

[5] The record does not disclose what caused Baez to change his mind concerning the time the employees were permitted to leave early after working through their meal period.

facility, and he turned around and reentered the facility. By then it was approximately 1:10 p.m. Arroyo left the facility.

Hernandez reentered the facility to talk to someone who was visiting a patient. As Hernandez was leaving, he encountered Marzon near Marzon's office. Hernandez asked Marzon for a donation to a little league baseball team for which Marzon had contributed in the past. Marzon agreed to again make such a contribution. Hernandez also passed Baez, who was speaking with two other persons. Baez asked where Arroyo was, and Hernandez said that Arroyo had left and that Hernandez had stayed, but he did not work. At no time did Hernandez perform any work after he returned to the facility that afternoon, a fact that Baez knew.

The job was completed that day by employee Hector Negron, who worked the 2 to 10 p.m. shift. It took Negron about 1-1/2 to 2 hours to complete the job.

On January 16, the next workday for Hernandez after January 13, Hernandez was summoned to a meeting with Begonia Melendez, human resources director, Baez, and del Rio. Hernandez was told that the meeting concerned the events of January 13. Melendez then read the following report that had been signed by Baez and dated January 13:[6]

> In the afternoon of Monday, January 13, 1997, [Hernandez] called me, to ask me to come to the Billing Dept. to inform me what was left to do in the washing and waxing; since he wanted to leave at 1:00 p.m. as I, [Baez], had authorized them to continue working on the half hour break for meals and had asked [Hernandez and Arroyo] to continue working the half hour and leave at 1:30 p.m., since it is only half an hour. Besides, there was still a section to be washed and waxed. In view of this situation and since we were trying to alleviate the work load for the afternoon shift, I considered it necessary to go on with the work until it was finished. In view of the disrespectful and negative attitude of [Arroyo], it was impossible to continue with the job and it was necessary for the 2:00 PM - 10:00 PM shift to carry it out. The time that the employee took in the afternoon to finish this task was not more than 15 minutes.
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> [Arroyo] answered the following way: "Tell [del Rio] that we are going to leave at 1:00 p.m. over your objections." I informed [Arroyo] that he must follow the orders given him by his superiors. Then [Hernandez] told [Arroyo] "friend, wait a minute, take it easy, let us not get involved in a problem, let us go at 1:00 and if we have to take an hour of vacations [sic], we ask for it." [Hernandez] then left to pick up the materials and wash the equipment. [Arroyo] for its [sic] part abandoned the Hospital.

Hernandez responded that he also had left at 1 p.m. He was assured that nothing would happen to him since he had stayed at the hospital while Arroyo had been insubordinate and had left the hospital. Hernandez again replied that he had also left. Baez stated that Hernandez had in fact remained at the facility on January 13, but Hernandez said that he had returned to the facility to visit a patient and that he had not performed any work during that time. Melendez said that it had been necessary for employee Negron to complete the work on January 13. Hernandez replied to this comment by asking how they could believe that he had stayed working to complete a job that supposedly took 15 minutes to finish when the job had to be completed by another employee. Hernandez did say that they had not violated any hospital policy because they had come to an agreement to leave at 1 p.m. and it was the supervisor who had told them they could leave at that time and then "fooled" them. Hernandez explained that the policy had been that employees could leave at 1 p.m. if they worked during their meal period with the agreement of their supervisor, and that this had been the policy for 5 years. Baez stated that he had told the employees to remain until 1:30 p.m. During the meeting Hernandez denied that Arroyo had been disrespectful on January 13. At some point Hernandez also claimed that he was taking the fifth amendment. He was told that Respondent would pay him for the meal period he worked on January 13.

On January 16, Arroyo reported for work. At about 1 p.m. he was called into a meeting with Melendez, Baez, and del Rio. Melendez said that she was going to read a report to Arroyo and that he should comment afterwards. Melendez then read the report made by Baez, set forth above. Arroyo replied that the report was not true; he explained that he and Hernandez had worked through their lunch period and then had left at 1 p.m., and that morning Baez had authorized them to do so. Melendez said that that was not the point; the point was that they were told to remain on the job to continue the task. She said that they would have been paid double time for time they worked during their lunch period. Arroyo said that after Baez authorized them to leave at 1 p.m., he had made an appointment for that time, and at the time Baez changed his mind he had not yet eaten lunch. During this meeting, Baez asserted that the job could have been completed in 15 minutes; that it was finished by employee Hector Negron in that time period at the start of the next shift on January 13. Arroyo responded that Baez knew that the job could not have been completed in 15 minutes and that it was not "manly" of Baez to say that. Arroyo asked that Hernandez be summoned to the meeting to clarify the facts, but Melendez said that she had already spoken with Hernandez that morning and Hernandez agreed with the report. Del Rio told Arroyo that he should have worked until 1:30 p.m. and completed the job as he had been instructed. Arroyo, upset by the comments that the job could have been completed by 1:30, responded, "Were you there?" Melendez then admonished Arroyo to be more respectful towards del Rio. Arroyo said okay, he was sorry. Melendez then said that Arroyo had been insubordinate in failing to follow Baez' instructions on January 13. She asked if Arroyo had anything more to say; Arroyo did not respond. Arroyo was asked about his last evaluation, and he said it was in 1996 and that his rating had been over 90. Melendez replied that an employee could have a rating of 100 but an act of insubordination was zero. She asked for Arroyo's identification and Arroyo gave it to her. Melendez testified that it was she who made the decision to fire Arroyo and that if Arroyo had shown a better attitude at this meeting she would not have fired him.

After Arroyo was fired he met Hernandez in the parking area. Arroyo asked if it was true that Hernandez had said that he had worked until 1:30 p.m. on Janaury 13 as Melendez had claimed. Hernandez said no, it was not true; he explained that he had returned to the hospital to visit a patient. Later, when

[6] Baez originally prepared a handwritten report of the events on January 13; that report was given to Hernandez and del Rio on January 14. After a typed version was prepared, the original handwritten version was destroyed. Thus, it is not possible to compare the two versions to see how, if at all, the typed version differed from the handwritten version.

Hernandez received his paycheck, it included payment for the time he had worked through the meal period on January 13. On about February 11, Hernandez gave Respondent a money order for that portion of his paycheck covering the meal period. Hernandez was then summoned for another meeting with Melendez and del Rio. Melendez asked why Hernandez had returned the money. Hernandez answered that he had not stayed working that day and he did not care if he were terminated because they had "contaminated" the climate for him in the office and unfortunately he had to be a witness for Arroyo because he did not stay working and he and Arroyo did not violate any rules. Melendez asked if it was true that at the January 13 incident Hernandez tried to calm Arroyo. Hernandez replied no, that he took the fifth amendment because Arroyo was not there. Melendez asked if Hernandez was being pressured by the "Union people." Hernandez said no, that it was his own pride and he could not lie. He said that he felt pressure from other employees since Respondent had terminated Arroyo and not him even though both had stopped working at 1 p.m. Hernandez said that he had told Respondent's supervisors the truth but they did not acknowledge it and that the person who lied was Baez.

D. Alleged Statements of Union Hostility

The complaint alleges that in or about February 1997, Respondent, through Jorge de Jesus, executive director, and Melendez, threatened its employees with loss of benefits and loss of employment if they selected the Union as their collective-bargaining representative.

In January and February, a number of meetings were held by Respondent with groups of employees for the purpose of discussing the upcoming election. These meetings were conducted by de Jesus and Melendez. Melendez started the meetings by explaining the benefits that the employees then enjoyed, what benefits the law required, and how the benefits had increased over time. She also compared Respondent's benefits to those paid by other hospitals. Melendez used visual aids to help make those points. As an example, de Jesus pointed out that employees then received a Christmas bonus of 3.8 percent which could at any time be reduced to 2 percent, which was what the law of the Commonwealth of Puerto Rico required at that time. At some point during the meeting, de Jesus said that if the Union won the election, benefits would start at zero. During the course of the meeting, de Jesus explained also that Respondent did not have much experience dealing with the Union because it was a newly formed labor organization. De Jesus recounted that at one time Respondent's parking lot was operated by an independent business but Respondent did not renew the contract with that business in order for Respondent's own employees to do the work. He pointed out that this was unlike the situation with other hospitals that had subcontracted services that they had formerly provided directly such as parking, security, and dietary department. De Jesus went on to say that if the Union won the election, Respondent could bring in a private company to perform the work that the employees were performing and fire the employees.

On or about February 27, 1997, de Jesus distributed a memorandum to employees concerning the Union. It was entitled "Another lie of the FETEMP" and stated in pertinent part:

> The FETEMP is saying that when the Hospital wins the election it is going to dismiss the employees that support the Union. This is **ANOTHER GREAT LIE AND DECEPTION** of the FETEMP, which is desperate, since it knows that the majority of the employees will vote **NO** on February 28.
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> At the Hospital there have been four elections, and **NEVER** has the Hospital hired private companies to substitute for our employees. On the contrary, the Hospital eliminated the companies that were in charge of the Cafeteria, Parking and Security Guards, converting the personnel that worked for them into employees of the Institution.
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> **This is the truth and that is what hurts the FETEMP**.

Employee Cristobal Montesino persuasively testified that the letter was not consistent with the statements made by de Jesus during the meetings in that at those meetings de Jesus said that Respondent could dismiss the employees and bring in a private company to perform their work if the Union won the election.

The complaint also alleges that in January 1997 Respondent, acting through del Rio, created the impression that employees' union activities were under surveillance.

In support of this allegation the General Counsel presented testimony that about a week after Arroyo's discharge, employee Hernandez heard a rumor that he and another employee were involved in assisting the Union's organizing campaign. Hernandez went to del Rio and told her that he had nothing to do the organizing effort, that he was in the "middle" or neutral. Del Rio replied that he should not worry, that he was "not on the list."

Although not alleged in the complaint as a specific violation of the Act, the General Counsel also presented evidence that several days before the election, del Rio called employee Cruz to her office. She read a warning to Cruz on a matter not at issue in this case, and then added that during previous organizing campaigns at the hospital, Respondent had learned which employees were for the Union; that Respondent had been very good to those employees because it allowed them to continue working for Respondent, and that many of those employees did not deserve to be working there. Cruz responded that if they already knew who was in the Union, since Arroyo was already gone, he, Cruz, would be first on the list. However, del Rio said that Cruz should not take it that way since that was not where she was coming from. Cruz complained that del Rio was saying that she was not "coming from there" but there were other persons who would "take digs" at him because he supported the Union. Del Rio then suggested that they do something about that and she took Cruz off his route for 3 days to avoid those encounters.

E. Alleged Disparate Treatment

Respondent maintains work rules that include a rule prohibiting insubordination, encouraging other employees to engage in insubordination, and demonstrating disrespect. Arroyo received a written copy of these rules. Melendez admitted that acts of insubordination do not automatically result in discharge. Instead, she testified that Respondent views each case differently based on the particular facts involved.

The General Counsel contends that Respondent treated Arroyo more harshly than it did other employees who engaged in acts of misconduct. Employee Angel Rivera had been employed by Respondent from June 1, 1993, to August 1996; he worked in the environmental services department. Rivera was suspended for 2 weeks when he failed to appear for work after

a Christmas party in 1993. On January 17, 1994, Rivera was verbally warned for failing to appear for work and failing to call in his absence in a timely manner. On March 24, 1994, Rivera was again warned about his absences and failure to report to work on time. On May 17, 1994, Rivera was advised by Melendez and de Jesus that he had successfully completed his probationary period and effective April 30 had become a regular employee. That same day his supervisor noted that Rivera's pattern of absences continued, and he recommended that Rivera be supended for 2 weeks. The record does not disclose whether Rivera was in fact suspended. On November 19, 1994, Rivera was verbally admonished for poor work performance. On May 5, 1995, Rivera was verbally admonished about his absentee record by del Rio. On May 9, 1996, Rivera's supervisor noted his continuing pattern of absences. On July 31, 1996, Rivera was again suspended for 2 weeks. On that occasion he was assigned by Supervisor Baez to perform work on the third floor. Rivera refused to work on that floor and instead went to work in another area of the hospital. The written warning that was given to Rivera along with the suspension states that he refused to follow a direct order from Baez in violation of Respondent's rules. The written warning also noted that on July 26, 1995, Rivera had also been warned for disobedience in arriving for work at unauthorized hours after having been advised that no changes in hours are allowed without supervisory authorization. Rivera protested his suspension to Melendez. He told Melendez that he "would comply with the work, and [he] would not incur this type of situation again." Melendez then reduced the discipline to a 1-week suspension, taking into account certain personal problems that Rivera was then experiencing. On August 12, 1996, Rivera was asked by Baez to pick up some trash. Rivera replied that he had too much work and Baez should wait until the employee on the next shift arrived. Baez said that he would wait for the next employee to arrive, but that he regarded Rivera's remarks as an excuse to refuse to do his job. Later that same day Rivera interrupted a conversation between another supervisor and an employee to ask the employee why that employee had performed a task that the employee had been asked to perform by his supervisor. Rivera bragged that he had earlier told Baez that he, Rivera, could not do the task that Baez had asked him to perform. On August 14, 1996, Rivera met with his supervisors and Melendez and del Rio to discuss these recent events. During the course of the meeting, Melendez asked whether Rivera's conduct had affected the service in the hospital. Del Rio answered that while service to the patients had not been affected, the work with biomedical wastes had been delayed. Melendez asked Rivera "to make a serious commitment to improve his attitude." Rivera was not otherwise disciplined on this occasion. Rivera was discharged August 16, 1996. His termination notice indicates that he was discharged for insubordination, taking more time than authorized for rest periods, and wasting time.

On May 14, 1991, employees Vergara and Villalobos were suspended for 2 weeks for eating in the pantry area of the hospital. On August 26, Supervisor Ruiz made a note that these two employees had left before completing the tasks that they had been assigned to complete. There is no evidence that these employees were disciplined for this conduct. On January 5, 1995, Villalobos' supervisor recommended that Villalobos be suspended for a week because he left Respondent's premises without permission. The record does not reveal whether Villalobos was in fact suspended. On March 9, 1996, Villalobos Villalobos was found sleeping when he should have working; he was suspended for 2 weeks.

On November 26, 1996, employee Hernandez appeared at work for the 6 a.m. shift when he had been scheduled to start work that day at 11 a.m. Supervisor Baez told Hernandez that Hernandez should have checked his schedule before appearing for work. Hernandez "angrily" left the office. Later that day Hernandez told Baez and another supervisor that they were "cabrones."[7] Baez testified that Hernandez's remark showed "a great form of disrespect." Baez also admitted that he regarded Hernandez' conduct to be a more serious form of misconduct than an employee raising his voice to a supervisor. Baez filed a written report of the incident with del Rio, who thereafter gave Hernandez a written warning for insubordination and improper conduct.

III. CREDIBILITY

Because of the sharply differing testimony on important facts, I shall set forth the basis for my credibility resolutions in detail. The facts concerning the events of January 13, as well as the practice of employees concerning working through their meal periods, are based on the testimony of Arroyo, who I conclude is a credible witness. His testimony was internally consistent and given in a forthright manner. It was corroborated in relevant part by the testimony of Jorge Hernandez, who I also conclude was an essentially credible witness concerning these events. I have considered the testimony of Baez, particularly that he told the employees from the outset that they could work through their meal period but they would have to work until 1:30 p.m. I do not credit Baez' testimony. It seems to me that if Baez had said that to the employees initially they would likely have chosen to take their meal periods instead. The record indicates this is in fact what happened when Respondent began limiting the time off to one-half hour when an employee worked through a meal period after Arroyo's discharge. Moreover, in light of the fact that the employees had been permitted to leave a full hour early under these circumstances in the recent past, it seems likely that they would have at least questioned, if not protested, the new policy that Baez was announcing to them. None of this appears in Baez' version of the facts. Finally, Baez' demeanor as a witness was not convincing. I have also considered Marzon's testimony that on January 13, he saw Hernandez working in the billing area after 1 p.m. and after Arroyo had left. I do not credit that testimony. Marzan was unable to convincingly say exactly what he saw Hernandez doing on that occasion and what state of completion the work was in at that time. Furthermore, he testified that he was called by Melendez and was asked if he saw Arroyo and Hernandez in the area. Importantly, he admitted, contrary to the testimony of Melendez, that he was not asked at that time, when events were still fresh in his mind, what he saw Hernandez doing in the area after 1 p.m. Marzon also appeared uncertain exactly when he spoke to Melendez about this matter—whether it was before or after Arroyo was discharged. I also note that while Respondent appears to reduce to writing many personnel related matters, there is nothing in writing that confirms that Melendez and Marzon spoke with each other in the manner in which they

[7] The interpreter loosely translated the Hernandez' comments as "you are all f—ed up." I note that the word "cabron" can also mean "cuckold." In any event, it is clear that Hernandez did not intend to exchange pleasantries with his supervisors when he called them "cabrones."

testified. This, combined with the fact that del Rio admitted that Melendez never told her before Arroyo's discharge that Melendez had interviewed anyone other than Arroyo and Hernandez before discharging Arroyo leads me to conclude that this portion of Marzon's testimony was created to enhance Respondent's position for trial purposes.

The facts concerning how long it took to complete the task assigned to Hernandez and Arroyo on January 13 after they stopped working are based on the testimony of Negron. Baez' testimony in this regard is not credible. He initially stated in his written report, described above, that the work was completed in 15 minutes. At the trial he testified that the work took Negron about an hour to complete. Baez then attempted to explain the discrepancy by testifying that at the time he wrote the report he believed that two employees were performing the work. I then asked Baez whether he wrote in the report that "the employee" took 15 minutes; he answered yes. In addition, for reasons explained elsewhere in this decision, I have already concluded that Negron's testimony is credible and Baez' testimony is generally not credible.

The facts concerning the meeting with Hernandez on January 16 are based on the credited testimony of Hernandez. I have considered the testimony of Baez, del Rio, and Melendez to the effect that Hernandez initially agreed that Baez' report was accurate, but only later changed his story to assert that he had stayed after 1 p.m. but did not work, and that he appeared to do so because he was under some presssure to avoid telling the truth. However, concerning Baez, I have already noted that his testimony was generally unpersuasive. In this specific instance he seemed able to recall little about the meeting other than that Hernandez initially agreed that Baez' report was accurate and only later did Hernandez change his mind. I conclude that if Hernandez felt pressure, it was from the position Respondent was putting him in when it excused his conduct but discharged Arroyo for the same conduct. I have considered Respondent's argument in its brief that Hernandez' testimony should not be fully credited. To be sure, Hernandez was not the most credible witness to appear in this proceeding, especially after his answer to the question for the name of the person he returned to visit in the hospital on January 13 was "Maria Perez," which can loosely be translated as the Spanish equivalent of "Jane Doe." However, I have concluded that, on the whole, Hernandez' testimony was more credible than that Respondent's witnesses.

The facts concerning the January 16 meeting with Arroyo are based on the testimony of Arroyo. I have considered the testimony of Baez, Melendez, and del Rio concerning this meeting. I have already concluded that Baez is generally not a credible witness. The testimony of del Rio and Melendez differs from Arroyo's concerning the contents of the meeting basically in matters of emphasis rather than significant substance. In any event, I conclude Arroyo's version of the meeting is more credible, based on the record as a whole. For example, del Rio testified that she was a little bit uncomfortable when Arroyo told Baez that Baez did not keep his word or was not manly, and that this attitude and disrespect by Arroyo contributed to his discharge. This clearly seems to be an exaggeration, since earlier, as more fully described below, employee Hernandez had called Supervisor Baez a "cabron" and del Rio merely issued him a written warning. Also, del Rio denied that Arroyo may have been confused concerning what Respondent's policy was regarding the amount of time an employee could leave early after working through a meal period, yet she admitted that Arroyo said that another supervisor had let him leave at 1 p.m. under those circumstances, and further admitted that it was not until February that Respondent made the policy official at a meeting with employees. Del Rio also attempted to explain the difference in attitude between Hernandez and Arroyo at the meetings held with them on January 16; she testified that Hernandez was nervous, but not defiant or excited, but that Arroyo was defiant. A comparison of what was said at each of the meetings simply does not support this differentiation. Del Rio was exaggerating in this regard when she claimed that even when Arroyo asked that Hernandez be brought to the meeting, he was exhibiting a defiant attitude, but when Hernandez was lying to them (according to Respondent's version of the events) concerning what he did after 1 p.m. and claimed the "Fifth Amendment," he was merely nervous. Del Rio consistently attempted to build up Hernandez as a good employee as compared to Arroyo despite Hernandez' less than spotless work record, and she contradicted herself in the process. For example, she initially testified than Hernandez was not hostile at the meeting where Hernandez returned the money, but when del Rio was confronted with the report she had earlier written, she admitted that Hernandez had been hostile. Furthermore, the testimony of Baez, Melendez, and del Rio was contradictory concerning, when, if at all Baez admitted to Melendez and del Rio that his report was inaccurate concerning the time it took for employee Negron to complete the job on January 13; Baez testified that he revealed this fact to them on January 16, del Rio claimed she was never told that part of the report was inaccurate, and Melendez testified that it was not until after Arroyo was fired and during the preparation for the trial in this case with Respondent's attorney that Baez first admitted the inaccuracy in his written report. Melendez' testimony also appeared to suffer from exaggeration. She claimed that in addition to interviewing Hernandez and Arroyo, she also spoke with Marzon and Ruiz before discharging Arroyo on January 16; however, there is no documentary evidence to support this testimony despite the fact that Respondent otherwise appears to document important personnel related matters. Also, according to del Rio, Melendez never informed her of this additional investigation. Finally, Melendez claims that she spoke to Ruiz on January 14, yet it is apparent that Ruiz' name was not mentioned until January 16 by Arroyo at the meeting at which he was fired. Thus, it does not seem that Melendez could have interviewed Ruiz before she fired Arroyo. Melendez' later explanation that the source of the information concerning Ruiz came from Baez an January 14 is not support by her testimony on direct or cross-examination; it is not corroborated by the testimony of Baez or Melendez; nor was it included in Baez' written report. This testimony appears contrived.[8]

The facts concerning the meetings Respondent held with employees in January and February are based on a composite of the testimony of employees Montesino, Cruz, and Negron. I note that Montesino is currently an employee at the hospital, a factor that contributes to his credibility. Based on my observation of the demeanor of Montesino, particularly in response to

[8] Interestingly, the General Counsel in his brief urges that I accept Melendez' testimony that she spoke with Ruiz prior to Arroyo's discharge. He argues that this strengthens his case because it directly shows that Melendez knew even before interviewing Arroyo that the employees were being allowed to leave at 1 p.m. and thus Baez' contrary instruction was confusing. However, for reason stated above, I decline to do so.

questions I asked him concerning the disputed portions of the meetings, I have determined to credit his testimony. Montesino's testimony was corroborated in part by the testimony of Cruz, who recalled the statements concerning benefits starting at zero. Cruz, however, did not testify that de Jesus explicitly stated at the meetings that Respondent would contract out certain services if the Union won the election. Instead, Cruz testified that de Jesus said that Respondent had gotten rid of the private contractors and used its own employees to perform those services but it could return to using private contractors again. In the context of the antiunion message conveyed at the meetings, this amounts to a subtle distinction without a difference; the employees heard the message that Respondent was seeking to convey—that Respondent could again use private companies to perform services that employees of Respondent then performed if the employees selected the Union. Montesino's testimony is also corroborated by the testimony of Negron to the extent that he testified that at the meetings de Jesus said that if a union came in Respondent could look for a private company and that benefits at the hospital would start from zero in bargaining a contract with the Union. Negron is not only currently employed by Respondent, but he is also a senior employee who had worked there for about 17 years. Moreover, this testimony was in response to questions that I asked after Respondent's attorney raised the subject during cross-examination despite the fact that the General Counsel had not asked these questions during his direct examination of Negron. I have considered de Jesus' testimony that admitted that he used the word "zero" during his meetings with employees but only to explain to employees that they would get zero automatic increases in benefits if the Union won the election. This rather strained explanation is corroborated by no one, not even Respondent's own witnesses. Indeed, a careful review of the transcript shows that de Jesus had difficulty himself explaining precisely what he said in this regard. I also reject Melendez' unconvincing denials that unlawful threats were made at these meetings.

The facts concerning the discussion between del Rio and Hernandez concerning his union activity are based on the testimony of Hernandez, which I again conclude is more credible than that of del Rio. Her testimony was that Hernandez told her that he had not been handing out union cards and that she told him that if he was not doing so he had nothing to worry about, and that he should ignore what the supervisor was saying concerning his distributing union cards. Del Rio denied making reference to any "list." Based on demeanor and the inherent probabilities, as well as difficulties with the testimony of del Rio described above, I have determined not to credit her testimony. Respondent argues in its brief that I should not credit the testimony of Hernandez since "Simple logic shows how extremely improbable it is that a Department Director would casually reveal keeping a list of union adherents to one of the employees by telling him, don't worry, you are not on the list." This argument might have been more persuasive if Respondent had not otherwise violated the Act. As will be seen below, I conclude that Respondent violated the Act by statements it made in front of groups of employees, and a similar argument that Respondent makes here could be made in that situation. The evidence as whole in this record convinces me that the statements were made as I have described them above.

The facts concerning the conversation between Cruz and del Rio are based on the testimony of Cruz, who I conclude is a credible witness. I have again considered del Rio's testimony that she did not mention anything about a union during this conversation. For reasons previously stated, I do not credit her testimony.

IV. ANALYSIS

A. The 8(a)(1) Statements

I have concluded above that during meetings held with employees in January and February, de Jesus said that Respondent could bring in a private company to perform work that the employees were performing and that the employees would be fired. This was in the context of explaining to employees the possible consequences of unionization. Such a threat of job loss has long been held to violate Section 8(a)(1) of the Act. *General Stencils,* 195 NLRB 1109 (1972).

I have also concluded that during these same meetings de Jesus said that if the Union won the election, benefits the employees received would start at zero. The clear implication of this statement is that employees would have to gain back through bargaining all the benefits that they then enjoyed. I note that Respondent did not carefully phrase its remarks to lawfully point out that there is no guarantee that benefits would increase as a result of unionization, and that benefits could increase, decrease, or stay the same as a result of bargaining with the Union. Thus, *Fern Terrace Lodge of Bowling Green,* 297 NLRB 8 (1989), and *Clark Equipment Co.,* 278 NLRB 498 (1986), cited by Respondent, are not on point. Instead, de Jesus' remarks constituted a threat of reduction of benefits if the employees selected the Union as their bargaining representative. This violated Section 8(a)(1) of the Act. *Lear-Siegler Management Service Corp.,* 306 NLRB 393 (1992).

I have found that in January, del Rio told employee Hernandez, who was concerned about rumors that he was assisting the Union's organizing efforts, that he should not worry because he was "not on the list." I find that Hernandez would reasonably conclude that del Rio was referring to list of employees kept by Respondent who were engaging in union activity. I note that del Rio made no effort to assure Hernandez that any such list was kept only of employees who engaged in open union activities visible to Respondent in the normal course of conducting its operations. Respondent may not give the impression that it is keeping the union activities of its employees under surveillance. I conclude that Respondent violated Section 8(a)(1) of the Act by engaging in this conduct. *Link Mfg. Co.,* 281 NLRB 294 (1986); and *Sierra Hospital Foundation,* 274 NLRB 427 (1985).

B. Arroyo's Discharge

The analysis set forth in *Wright Line*[9] governs the determination of whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging Arroyo. The Board has restated that analysis as follows:

> Under *Wright Line*, General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legiti-

[9] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

mate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9]

[7] *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 400 (1983).

[8] See *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990) ("By assessing a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

[9] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

Applying this analysis to the facts of the case, the first element of the General Counsel's case is clearly established. Arroyo was among the leaders, if not the leader, of the Union's efforts to organize the employees. Arroyo's union activities were both extensive and prolonged, and they involved interaction with numerous employees.

The record is also clear that Respondent knew that its employees were engaging in activity in support of the Union. Two petitions had been filed and withdrawn by the Union in the weeks prior to Arroyo's discharge. Indeed, Respondent held a meeting with its supervisors to tell them about the Union in November 1996, and it was admitted that by that time all of Respondent's supervisors knew about the Union. Moreover, the evidence shows that during past organizational campaigns, as del Rio admitted to employee Cruz, Respondent had become aware of which employees supported the Union. Finally, as del Rio admitted to employee Hernandez, Respondent had kept a list of which employees were involved in supporting the Union in the most recent organizing effort. Moreover, as pointed out by the General Counsel in his brief, the first petition filed by the Union in this case was limited to employees in the environmental services, or housekeeping department. This would reasonably lead Respondent to conclude that the union organizing campaign began in that department, the very department where Arroyo worked. All this evidence helps meet the General Counsel's case by proving the element of knowledge. However, there is no direct evidence that Respondent was aware of Arroyo's union activity prior to his discharge. This weakens the General Counsel's case. I shall return to this matter later to determine whether it is proper to infer specific knowledge of Arroyo's union activity from other facts in the record.

I turn now to the element of timing. On the one hand, at the time Arroyo was fired there was no petition pending of which Respondent was aware. To the contrary, the two earlier petitions had been withdrawn. Nonetheless, Arroyo was discharged within a short period of time after those petitions had been filed and withdrawn. There is no evidence to suggest that Respondent had concluded that the organizational efforts of its employees had ended by the time of Arroyo's discharge. To the contrary, the first petition was withdrawn due to the inappropriateness of the petitioned-for unit. The Union resolved that problem and filed the second petition, which in turn was withdrawn for an inadequate showing of interest. Thus, the likely possibility existed that the Union would at least seek to cure that defect by soliciting additional authorization cards from Respondent's employees. Thus, on balance, the timing of Arroyo's discharge contributes to the General Counsel's case.

I now examine the record to determine whether the General Counsel has established that Respondent was hostile to the union organizing effort. Here too there are facts that weigh on each side of this issue. On the one hand, although there apparently have been organizing efforts among Respondent's employees in the past, there is no evidence that Respondent has engaged in any unlawful conduct. In this case, Respondent stipulated to an election among its employees and other leading union activists were apparently not discriminated against. On the other hand, Respondent admittedly did not want its employees to be represented by the Union. Indeed, I have concluded that Respondent unlawfully threatened its employees with job loss and loss of benefits if they selected the Union, and unlawfully created the impression that it was keeping the union activity of its employees under surveillance. This unlawful activity establishes both that Respondent was hostile toward union activity and that it was willing to violate the law to deter employees from selecting the Union as their collective-bargaining representative. These facts serve to strengthen the General Counsel's case.

I turn to reasons given by Respondent for discharging Arroyo to determine whether they also support the inference that Arroyo was unlawfully fired. Respondent asserts that Arroyo was fired for insubordination on January 13 in refusing to follow Baez' instruction to keep working until 1:30 p.m.; for the poor attitude he displayed on that day and during his meeting with del Rio and Melendez on January 16; and after examining Arroyo's work record.

As to the matter of insubordination, Arroyo clearly disobeyed his supervisor's instruction to remain working until 1:30 p.m. This is a serious matter that, depending on the factual setting, could certainly support a conclusion of a nondiscriminatorily motivated discharge. However, the factual context in this case does not support such a conclusion. First, the facts do not show a simple, uncomplicated case of employee defiance of a supervisor's instruction. Instead, Baez initially told the employees that they could leave at 1 p.m. if they worked through their meal period, yet for reasons unexplained in the record, after they had done so and made plans to leave at 1 p.m., he then told the surely hungry employees that they had to cancel the plans they had just made and remain working another one-half hour. And Baez' last instruction was contrary to Respondent's practice in this regards as the employees understood it. These facts do not necessarily excuse the employees failure to remain working even under these circumstances. However, given the fact that Respondent admits that it normally takes into account the individual facts of each case, these facts would tend to ameliorate the harshness of the discipline that such an employer would take. The fact that Respondent knew of these ameliorating factors and normally considers such factors yet proceeded to fire Arroyo nonetheless causes one to ponder why it acted as it did.

I have also concluded that Hernandez also was insubordinate when he stopped working at 1 p.m., yet he was not disciplined at all. I reject the argument that the reason Hernandez was not disciplined was because Respondent believed that he remained

in the facility working on January 13. I have concluded that Baez knew that Hernandez did not work after 1 p.m., and even if del Rio and Melendez did not know this initially, they certainly knew this before Arroyo was discharged when Hernandez himself told them this fact during the meeting on January 16. I also reject the notion that Respondent did not accept Hernandez' assertion that he, like Arroyo, had stopped working because Respondent reasonably believed that Hernandez was fabricating this assertion due to pressure. There is no evidence that in fact any pressure was placed on Hernandez to fabricate this assertion and there was no reasonable basis for Respondent's refusal to accept it for its face value. Instead, it appears that Respondent was indifferent to the facts that did not support its conclusion to discharge Arroyo. This, in turn, supports an inference that there may be another unspoken reason for Arroyo's discharge. Returning to the larger picture, Respondent's blatant disparate treatment of employees who committed similar misconduct also supports the inference that it was not the misconduct but some other reason that motivated the discharge.

Quite apart from the disparate treatment Respondent accorded Arroyo and Hernandez, the record reveals that Respondent does not routinely discharge employees who engage in similar acts of misconduct. I have described above how employee Rivera engaged in insubordinate conduct and not only was he not discharged, but Melendez reduced his discipline to a 1-week suspension. Rivera thereafter again refused to follow his supervisor's instructions and then boasted about it to another employee and supervisor. This time Rivera was merely admonished by Melendez to improve his attitude. Employee Villalobos also engaged in serious acts of misconduct, yet he was not fired. To paraphrase what del Rio said concerning Arroyo's past record, one could have a rating of 100, but an act of insubordination was zero. This standard was applied to Arroyo but certainly not to Hernandez, Rivera, or Villalobos. These facts yet again support the inference that it was not Arroyo's misconduct on January 13 that motivated Respondent to fire him.

Respondent asserts that Arroyo's poor attitude contributed to his discharge. Indeed, Melendez, who made the decision to fire Arroyo, asserted that had Arroyo displayed a better attitude he would not have been fired notwithstanding his earlier misconduct. I conclude that the facts do not support Respondent's assertion that Arroyo's attitude was so poor that it contributed to his discharge. First, the fact that Arroyo was angry by the sudden turn of events on January 13 due to Baez' contradictory instructions and false claims should have been understandable to Respondent. Moreover, there is no evidence that Arroyo engaged in blatantly inappropriate conduct at anytime during the meetings with Respondent's officials. Moreover, it is difficult to discern how Arroyo's attitude significantly differed from Hernandez' attitude. Both were angry at Baez' last minute change of instructions. While Hernandez did tell Arroyo to calm himself, that they would leave at 1 p.m. and raise it with others later, he joined Arroyo and stopped working. On January 16, Hernandez remained angry and unapologetic in his meeting with del Rio and Melendez, yet he was not disciplined. Even more significant is the fact that Respondent tolerated even significantly more disrespectful conduct by its employees, as fully described above. Here too Respondent's asserted reason for firing Arroyo rings hollow.

Finally, Respondent asserts that it took into account Arroyo's entire work record. First, this is contrary to what del Rio told Arroyo, when she indicated that one act of insubordination was sufficient to discharge him. In any event, as more fully described above, Respondent tolerated work records worse than Arroyo's.

In sum, the reasons given by Respondent to support its discharge of Arroyo do not withstand scrutiny. In fact, a comparison of those reasons with the policy Respondent would normally apply leads me to conclude that an unstated reason motivated the discharge of Arroyo. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966). Under all the facts of this case, I infer that the unstated reason was Arroyo's union activities.

I return to the fact that the General Counsel did not establish by direct evidence that Respondent had knowledge of Arroyo's union involvement, although Respondent did have knowledge of union activity in general, knew that the union activity began in Arroyo's department, and claimed to have kept a list of employees who supported the Union. I conclude that this inadequacy in the General Counsel's evidence is not fatal to his case. This is because from all the facts, I am able to make the inference that Respondent in fact was aware of Arroyo's union involvement. These facts include the extensive and prolonged nature of Arroyo's union activity, the facts that Respondent had some degree of knowledge of its employees union activities, and the circumstances surrounding Arroyo's discharge leads to the inference that he was fired for his union activity. I conclude that the General Counsel has met his burden under *Wright Line.*

I have considered the arguments and cases propounded by Respondent in its brief. I consider those cases to be inapposite. For example, in *Kantor Pepsi-Cola Bottling Co.,* 248 NLRB 99 (1980), the administrative law judge found that there was no direct evidence that the respondent in that case had knowledge of the alleged discriminatee's union activities. The administrative law judge did acknowledge that this element of the General Counsel's case could be proven through circumstantial evidence, but he concluded that there was insufficient evidence to support such an inference. That is unlike this case, where I have concluded that the General Counsel has established facts that warrant the inference that Respondent was aware of Arroyo's union activity prior to his discharge.

Of course, Respondent may avoid liability even in the face of the General Counsel's case if it can show that it would have discharged Arroyo even if he had not engaged in union activity. However, I have already determined above that Respondent's reasons for firing Arroyo are so unsupportable under the standards that it would normally apply that their assertion actually serves to strengthen the General Counsel's case. It follows then that Respondent has failed to meet its burden under *Wright Line* to avoid liability.

Under these circumstances, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act when it discharge Arroyo on January 13.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Threatening employees that it would use hire private companies to do the jobs performed by its employees, and that

those employees would lose their jobs, if the employees selected the Union as their collective-bargaining representative.

(b) Threatening to reduce employee benefits to zero if the employees selected the Union as their bargaining representative.

(c) Giving the impression to employees that their union activity was under surveillance.

4. By discharging employee Adibal Arroyo on January 16, 1997, because he engaged in union activity, Respondent has engaged in an unfair labor practice in violation Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Arroyo, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Hospital San Pablo, Inc., Bayamon, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it would hire private companies to do the jobs performed by its employees and that they would lose their jobs if the employees selected the Union as their collective-bargaining representative.

(b) Threatening to reduce employee benefits to zero if the employees selected the Union as their collective-bargaining representative.

(c) Giving the impression to employees that their union activities were under surveillance.

(d) Discharging or otherwise discriminating against any employee for supporting the Federacion de Trabajadores de la Empresa Privada (FETEMP) or any other union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Adibal Arroyo full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Adibal Arroyo whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Adibal Arroyo in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bayamon, Puerto Rico, copies of the attached notice, in English and Spanish, marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you that we would hire private companies to do your job or that you would lose your job if the employees select the Federacion de Trabajadores de la Empresa

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Privada (FETEMP) or any other union as their collective-bargaining representative.

WE WILL NOT threaten to reduce your benefits to zero if the employees select a union as their collective-bargaining representative.

WE WILL NOT give you the impression that we are keeping your union activities under surveillance.

WE WILL NOT discharge or otherwise discriminate against you because you engage in activity in support of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Adibal Arroyo full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Adibal Arroyo whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Adibal Arroyo, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

HOSPITAL SAN PABLO, INC.